

ERIC KINSINGER and
DENISE KINSINGER,

Plaintiffs,

vs.

SMARTCORE, LLC, et al.,

Defendants.

DOCKET NO. 3:17-CV-643

APPEARANCES :

JILLIAN M. TURNER, RMR, CRR, CRC
Official Court Reporter
United States District Court
Charlotte, North Carolina

APPEARANCES (Cont'd):

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On Behalf of Defendant Jared Crafton Crook:

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1 (Court called to order on Monday, February 4, 2019,
2 commencing at 11:10 a.m..)

3 P R O C E E D I N G S

4 THE COURT: Give me a moment to organize my notes.

5 We are here in the case of Kinsinger, et al., versus
6 SmartCore LLC, et al., on the cross-motions for summary
7 judgment.

8 Let's see. Mr. Tyson.

9 MR. TYSON: Yes, Your Honor.

10 THE COURT: And?

11 MS. MATESIC: Rachel Matesic, Your Honor.

12 THE COURT: Matesic. All right. On behalf of
13 plaintiff.

14 And we go to defense, the multiple legal entities
15 and human defendants.

16 Is counsel representing the whole group of
17 defendants?

18 MR. NORRIS: Except for Jared Crook, Your Honor.

19 THE COURT: Except for Mr. Crook. And he's in
20 default, right?

21 MR. NORRIS: Actually, there's a motion. I'll let
22 Mr. Glenn address that. He's here.

23 I'm Matthew Norris for all operative defendants,
24 except for Mr. Crook.

25 THE COURT: All right. Thank you, Mr. Norris.

1 MR. GILBERT: Heath Gilbert here as well.

2 THE COURT: Mr. Gilbert, thank you for being here.

3 You didn't quite have to come as far as Mr. Norris.
4 Just down the block, right?

5 MR. GILBERT: Yes, sir.

6 THE COURT: And you're representing Mr. Crook?

7 MR. GLENN: Your Honor, yes. Lou Glenn. I'm
8 representing Mr. Crook by appearance in the motion filed last
9 week.

10 THE COURT: Right. So plaintiffs have not had an
11 opportunity to respond to the motion to set aside default;
12 isn't that right?

13 MR. TYSON: Yes, that's correct, Your Honor.

14 THE COURT: That will probably be decided on paper.
15 I don't see a reason for a hearing on that.

16 MR. GLENN: Yes, Your Honor.

17 THE COURT: I mean, there's -- there's no disputed
18 facts. Well, I shouldn't comment. I just have to let parties
19 file something and then we'll rule on it.

20 So we'll focus in today on the two summary judgment
21 motions and the cross-motions for summary judgment. And since
22 plaintiffs do have a motion for summary judgment, I will let
23 Mr. Tyson begin and then we'll turn it over to defense.

24 MR. TYSON: Thank you. Good morning, Your Honor.

25 I, Brian Tyson, and Rachel Matesic are counsel for

1 the plaintiffs in this case, Eric Kinsinger and Denise
2 Kinsinger. We filed our briefs in this case requesting that
3 the Court grant summary judgment to us on all of our claims
4 and deny defendants' motions for summary judgment in its
5 entirety. We stand on our briefs. We believe the briefs, the
6 evidence that we submitted contain all the information for the
7 Court to rule in our favor and to deny defendants' motion.

8 But there were a few items I thought might be
9 helpful to the Court that we wanted to point out for some of
10 our claims.

11 First, with respect to our claim for wages, under
12 the North Carolina statute, the North Carolina statute says
13 that employers or anyone acting in the interest of an employer
14 must pay promised wages. They didn't. We've submitted an
15 affidavit from Eric. He also attaches his paystubs. He
16 attached documents from SmartCore showing that they did not
17 pay him. And notably, in none of the affidavits or in their
18 briefs did they deny they didn't pay him. This is an easy
19 case.

20 THE COURT: That part, right?

21 MR. TYSON: Yes, Your Honor. Yeah, I think --

22 THE COURT: Well, I said "that part." I mean, the
23 Wage and Hour Act and breach of contract issue. At least I
24 get the impression that that's not being contested, but we'll
25 hear that in a moment.

1 MR. TYSON: Okay. So, yes, the wages are due to
2 Eric.

3 And then in addition, the statute provides that the
4 Court shall double the amount of wages as liquidated damages.

5 THE COURT: I thought we had to have a hearing on
6 that?

7 MR. TYSON: No, Your Honor. The statute says -- and
8 I can actually get a copy of it.

9 THE COURT: That doesn't it require a bad faith
10 finding?

11 MR. TYSON: No, Your Honor, it does not. And here,
12 let me -- if I can read the portion of the statute to the
13 Court, that might be helpful. Here we go. And this is
14 95-25.22(a1) of the North Carolina General Statutes.

15 So it says, "In addition to the amounts awarded
16 pursuant to subsection (a)," and that's the base wages, "the
17 court shall award liquidated damages in an amount equal to the
18 amount found to be due provided that if the employer shows to
19 the satisfaction of the court."

20 So it says the Court shall do that. However, If the
21 employer was able to show to the satisfaction of the Court
22 that it had good faith and reasonable grounds for believing
23 that it was not violating the statute, the court may, in its
24 discretion, choose not to award damages or to award some
25 lesser amount.

1 So they have the burden of production and
2 persuasion. They have produced no reason --

3 THE COURT: But there's still a hearing on that
4 issue or whether you want to call it acting in bad faith or
5 not acting in good faith. And I guess the way you read me the
6 statute is not acting in good faith is probably the better
7 interpretation. But they have the burden to show they didn't
8 act -- well, that they did act in good faith. Doesn't that --
9 that requires a bench trial, right?

10 MR. TYSON: I mean, we would say, no, Your Honor,
11 and let me explain.

12 THE COURT: But you just said that after the Court
13 finds -- read that last half of the sentence again. Provided
14 that or whatever.

15 MR. TYSON: Right, certainly. So it says, "The
16 Court shall award liquidated damages if the employer shows to
17 the satisfaction of the Court that the act or omission
18 constituted a violation was in good faith and the employer had
19 reasonable grounds, the Court may in its discretion liquidate
20 damages."

21 The reason we're saying we don't need a hearing on
22 that is they provided no evidence whatsoever to explain why
23 they didn't pay him his wages. They have not shown anything
24 as to good faith or reasonable belief of compliance with the
25 law. The only thing they said, yeah, we didn't pay him his

1 wages. So they would actually have to bring forth some
2 evidence to Your Honor to say, no, no, we've created a genuine
3 issue of material fact. And, again, the genuine issue of
4 material fact; not just, well, we didn't feel like paying him

5 An example might be if an employer accidentally ran
6 the wrong payroll or made a mistake and two weeks later tried
7 to correct that and made some good faith attempt. They've
8 provided nothing. They simply said -- they don't even contest
9 that they owe him this money. Instead, they've litigated this
10 case for the past year. The amount of damages that he is due
11 is \$6,250.

12 THE COURT: Right, plus statutory interest.

13 MR. TYSON: Yes, Your Honor. Correct. Yes.
14 Statutory interest at the North Carolina rate. And we're
15 requesting attorney fees as well under the North Carolina
16 statute. But that's what they've litigated over the past
17 year.

18 THE COURT: Under the wage and hour statute.

19 MR. TYSON: Yes, Your Honor.

20 But they have provided no evidence to the Court as
21 to why they didn't pay anything. So they actually have to
22 provide some evidence for there actually to be a genuine issue
23 of material fact over whether there was good faith or
24 reasonable grounds. The fact that they haven't means we
25 should be granted summary judgment. And if the Court should

1 award us, the double damages as well.

2 THE COURT: All right.

3 MR. TYSON: With respect to our claim --

4 THE COURT: Let's go to the ERISA stuff now.

5 MR. TYSON: Yes, sir.

6 With respect to our benefits claim -- and that's
7 under ERISA 502(a)(1)(B) -- I have good news for you. This is
8 a really easy ERISA case. I know ERISA gets a bad rep
9 sometimes for being a complex statute. This one is not. The
10 plan is the plan is the plan. This is just a simple plan
11 document. It says that if you have a medically necessary
12 surgery, then you are entitled to have that paid for.
13 Denise Kinsinger had a medically necessary surgery. Her
14 doctor, Dr. Pillai, said it was medically necessary. That
15 information got sent to Starmark, which was the claims
16 fiduciary at the time. Starmark --

17 THE COURT: Starmark is no longer a party, correct?

18 MR. TYSON: That is correct, Your Honor.

19 THE COURT: They initially were sued, but they --

20 MR. TYSON: Yes, they dropped them.

21 THE COURT: Yeah, they were kind of a conduit,
22 right? Money comes to them, and then they send the money out
23 to settle claims.

24 MR. TYSON: Exactly.

25 THE COURT: Even if it didn't come to them in the

1 first place, they're not at fault for that. So that's why
2 they're no longer in the action.

3 MR. TYSON: I think that -- yes. And Your Honor
4 raises an important point, and it sounds like the Court
5 already understands it, but just to be clear. This is what is
6 called a self-funded plan. So in the ERISA world you have
7 insured plans and then self-funded plans. This was not a plan
8 that has health insurance on it; rather, it was self-funded.

9 So SmartCore was responsible for paying all the
10 money to pay benefits. So they're supposed to pay benefits.
11 They're supposed to pay Starmark for its administrative work
12 and actually running the plan. And then SmartCore had
13 purchased what's called a "stop-loss policy." So, in other
14 words, they still had a self-funded plan.

15 THE COURT: A reinsurance type of thing?

16 MR. TYSON: Exactly, yes.

17 So if the claims got too long, then potentially
18 SmartCore, the employer, would get reimbursed. But it was a
19 self-funded plan. So there is no dispute.

20 And as far as --

21 THE COURT: I thought there was a dispute about
22 denials? They said, oh, this was denied by over the phone and
23 denied in other ways, and so they -- Ms. Kinsinger shouldn't
24 have had a hysterectomy in the first place.

25 MR. TYSON: So let me address that.

1 No, there is not a -- there's not a genuine issue of
2 dispute of fact that would not entitle us to summary judgment.
3 So they attached a couple of emails where Eric, my client, had
4 emailed them when the company was starting not to do well and
5 said, What's going on? I've got information saying that
6 Starmark isn't now going to follow through, Starmark is going
7 to do this. What happened here?

8 So there's emails going back and forth, but there is
9 not an ERISA denial, and that's important because the ERISA
10 claims regs under Section 502 -- I'm sorry -- 503 specifically
11 state what a denial has to provide. So it has to provide five
12 different pieces of information. It has to provide why I'm
13 denying your claim; has to tell you part of the benefit plan
14 under which you're denying the claim. For medical necessity
15 determination, which is exactly what was at issue here, they
16 actually have to say why this is not medically necessary. And
17 they have to consult a doctor who is trained in that area of
18 practice. None of the documents, the emails that they
19 submitted have any of that information.

20 And so the ERISA claims regs then say if you don't
21 provide a denial that complies with ERISA's claims regs, there
22 is no administrative procedure. You're welcome to go to
23 court.

24 So we actually tried -- that's what Eric tried to
25 do. We, nonetheless, submitted a claim and said, I'd really

1 like to get this resolved. I just want the claim paid. I
2 want my wife's surgery paid for. So we went ahead and
3 submitted all the documentation. They never responded. Eric
4 was entitled to come to court as soon as they send an email
5 saying, Hey, we're not going to follow through at this time.

6 THE COURT: Are the Kinsingers personally liable for
7 the medical services at this point?

8 MR. TYSON: Your Honor, they're getting sued in
9 South Carolina state court as we speak.

10 THE COURT: That's why I was wondering.

11 MR. TYSON: Yes.

12 THE COURT: I thought there had to be a suit.

13 MR. TYSON: Yes.

14 THE COURT: And I didn't know why it wasn't here.
15 It kind of tied into it, but now I see it's down in
16 South Carolina because that's where they live?

17 MR. TYSON: Yes, Your Honor.

18 THE COURT: Where the hospital was?

19 MR. TYSON: Correct. Yes. And we had tried to
20 remove it. The Court ended up deciding to put that back in
21 South Carolina.

22 THE COURT: Yeah. When my workload is sufficient
23 that where there's already a suit pending someplace else, I
24 don't need to add it to this case. But if it had been
25 originally here, it would be a different story.

1 MR. TYSON: Right. So, yes, they're getting sued
2 currently in South Carolina because they refuse to fund the
3 plan and to follow through.

4 But the only evidence before the Court and why we
5 should be entitled to summary judgment on this (a) (1) (B)
6 claim, the benefits claim, is we filed the administrative
7 record. The only thing that the Court is supposed to look at
8 under the Fourth Circuit precedent in *Quesinberry* is the
9 administrative record.

10 The only thing in there is Denise Kinsinger's
11 doctor's, Dr. Pillai's, medical records that say medically
12 necessarily. Starmark's doctor looked at these,
13 Dr. Zawilenski. He said medically necessary. Starmark said
14 medically necessary and precertified the surgery. That's the
15 only evidence in there. They provided no evidence to the
16 contrary. They've submitted no affidavits from doctors. They
17 haven't provided any kind of medical evidence whatsoever.
18 They haven't said why she might not be entitled to this. The
19 only evidence before the Court is that the surgery was
20 medically necessary and it should have been paid.

21 I wanted to talk about the fiduciary breach claim,
22 and that's under 502(a) (2) .

23 THE COURT: Um-hum.

24 MR. TYSON: And, again, this case is a simple ERISA
25 claim. What we're asking for here is on behalf of the plan,

1 they set up a health insurance plan. They took money from
2 participants' paychecks. They said we're going to go and put
3 that money and spend it on a health plan and fund clients'
4 claims, like my client. Instead, they can't.

5 We don't know what they did with the money. It
6 doesn't matter, though. It doesn't matter whether they spent
7 it on corporate purposes. It doesn't matter if they gave it
8 to charity. It doesn't matter whether they spent it at the
9 Dollar Tree. The only question under ERISA is whether they
10 spent it for a health purpose. The evidence is clear they did
11 not. We submitted that evidence to the Court and, once again,
12 they haven't denied that. None of their affidavits say, oh,
13 no, we didn't take the money and spend on it on health care.
14 They didn't argue that in the brief.

15 So they are liable for this. Good and Winn are
16 individually liable. The ERISA statute provides for
17 individual liability for fiduciaries.

18 THE COURT: Right.

19 MR. TYSON: So we're requesting --

20 THE COURT: And, likewise, your position is
21 Mr. Quick is liable also because you got default judgment
22 but --

23 MR. TYSON: That -- that is correct, Your Honor.
24 Yes, he has admitted everything in the complaint; so he would
25 be liable as well as jointly and severally.

1 THE COURT: All right.

2 MR. TYSON: With respect to our (a)(3) claim -- and
3 that's under ERISA 502(a)(3) for appropriate equitable
4 relief -- as we mentioned, that claim is pled in the
5 alternative to our benefits claim and fiduciary breach claim.
6 So if the Court did grant summary judgment on those two
7 claims, this would be a moot alternative claim for us at that
8 point.

9 With respect to the plan documents claim, Congress
10 has said that a participant is entitled to obtain a copy of:
11 The latest SPD, summary plan description; the latest plan
12 document; any other contract under which the plan has
13 established or operated.

14 So when Eric got information saying from the -- from
15 Good and Winn saying we think we might start to look at this
16 again, we requested -- he requested a copy of the plan
17 documents. He's the participant, so he's allowed to do that.
18 He wrote to them and said, Please give me a copy of the plan
19 documents and any other information which the plan has
20 maintained. They never responded.

21 Once again, summary judgment is proper because they
22 don't deny that. So they never responded to and provided us
23 the latest copy of the plan document, the summary plan
24 description, the administrative services agreement, the
25 Trustmark insurance contract, or even the administrative

1 record.

2 Factors that courts have looked at in looking at
3 damages under this portion of ERISA are the length of time
4 that has occurred. So in this case it was 740 days, over two
5 years. Additionally, they never even responded to it. The
6 only way we got this information was through discovery. They
7 finally had to respond to discovery. And that's -- we
8 actually amended our complaint. Our second amended complaint
9 added this cause of action. Even after that they didn't
10 bother responding. It was only finally after discovery when
11 they actually produced the documents to which Eric was
12 entitled. They made no efforts to comply.

13 Eric had to prosecute his claim without having the
14 documents which explain who is a fiduciary, whether the plan
15 is self-funded, and provide other information he's entitled to
16 under ERISA.

17 And then there's five documents. This wasn't like,
18 hey, we forgot the last page or we kind of messed up and
19 didn't send something. They didn't do anything. They wholly
20 aggregated the responsibility to send these documents to Eric.
21 And one of ERISA's most important parts is to apprise
22 participants and beneficiaries of information so they can
23 understand what their rights and responsibilities under the
24 plan are.

25 THE COURT: Okay. Let's finish up so we can hear

1 from the defense.

2 MR. TYSON: Yes, Your Honor.

3 So, Your Honor, is entitled -- it's within the
4 Court's discretion. Your Honor is entitled to zero. And by
5 my calculation, five documents, \$110 a day, 740 days,
6 \$410,300. So it's within the Court's discretion to award
7 those. And the Fourth Circuit has made clear this is to
8 punish; this is not to compensate someone. This is to punish
9 defendants for not responding as they should have as
10 fiduciary.

11 We request that you grant our motion in full and
12 deny theirs. Thank you.

13 THE COURT: Thank you.

14 So, Mr. Norris, you're arguing, right?

15 MR. NORRIS: Yes.

16 THE COURT: You may proceed.

17 MR. NORRIS: Good morning, Your Honor. Thank you.

18 A little bit of confusion here, I think, results
19 from the posture of not necessarily the litigation, but the
20 posture of how things were handled when SmartCore had the
21 responsibility, and it did have responsibility as a fiduciary.
22 The names are a little confusing. I'm the sure the Court is
23 on top of it but --

24 THE COURT: Not necessarily.

25 MR. NORRIS: All right.

1 THE COURT: I mean, SmartCore versus Starmark.
2 Starmark's out.

3 MR. NORRIS: Exactly. Well --

4 THE COURT: Each had different responsibilities.
5 One is the employer and one is kind of an agent.

6 MR. NORRIS: That's what they say, and that's where
7 we need to be able to clarify that.

8 THE COURT: Okay. Go ahead.

9 MR. NORRIS: Yeah. So SmartCore is who I represent,
10 and Mr. Winn and Mr. Good were the principals effectively of
11 SmartCore. Mr. Crook was an employee of SmartCore.

12 Starmark basically, if you want to distill things
13 down in ERISA sense, Starmark was the plan administrator. And
14 plaintiffs like to characterize and have characterized
15 throughout their pleadings in this case have attempted to
16 characterize Starmark as, you know, something that's not -- an
17 entity that's not particularly --

18 THE COURT: Well, why -- why is -- why is Starmark
19 out if -- if you're pointing to Starmark?

20 MR. NORRIS: You would have to ask the plaintiffs.

21 THE COURT: No. No. They can kick them out. But
22 you could have sued Starmark.

23 MR. NORRIS: We did. We had a cross-claim against
24 Starmark, and we signed a tolling agreement.

25 THE COURT: And where -- where is that?

1 MR. NORRIS: With subject to a tolling agreement,
2 depending on what happens in this case, Your Honor. So we
3 dismissed them. We each had cross-claims against each other.
4 I think technically theirs was nominated as a counterclaim
5 against us.

6 THE COURT: Now you got to deal with Starmark, and
7 you're saying Starmark is the bad guy.

8 MR. NORRIS: Starmark is responsible here, Your
9 Honor. Starmark is --

10 THE COURT: That's an interesting twist. I don't
11 know. I don't know.

12 MR. NORRIS: Well, Starmark is -- well, actually,
13 the reason for the -- the reason for the tolling agreement,
14 Your Honor, was to try to simplify the case and settle the
15 case with the plaintiffs, because the way that this looked to
16 me, as someone who has been doing ERISA for, I don't know, 20,
17 21 years, the way this always looked to me was it looked like
18 an attempt by the Kinsingers to get their medical bill paid,
19 which, you know, we don't necessarily quarrel with. And
20 indeed, Starmark has been let of the case. And I don't know
21 how much the Court wants to hear about settlement or something
22 like that; so I won't go into it right now unless you ask,
23 Your Honor.

24 We have every reason to believe --

25 THE COURT: Settlement is not important for the

1 Court today.

2 MR. NORRIS: Okay.

3 THE COURT: The Court sometimes offers a judicial
4 settlement. Either I might do it, one of the magistrate
5 judges, or my colleagues the district judges might do it.

6 MR. NORRIS: Sure.

7 THE COURT: There, we are concerned about
8 settlement. Here, we're here on law. Settlement is totally
9 irrelevant.

10 MR. NORRIS: I understand. Although Your Honor's
11 procedures do provide that at summary judgment hearings that
12 the parties get an opportunity after to talk. My clients are
13 actually here in the courtroom today.

14 THE COURT: That's why we have these hearings.

15 MR. NORRIS: Yeah.

16 THE COURT: We -- we want to move the case along
17 within the schedule we've set in the case management order.
18 So we have summary judgment hearings where, you know, I can
19 touch the parties and the counsel and the parties and counsel
20 can touch each other and we can resolve some -- hopefully
21 resolve some of the case, maybe not. But we bring everyone
22 together, and now we're on track when we leave here on track
23 for a trial in March or early April.

24 MR. NORRIS: Sure. And in the spirit of that, Your
25 Honor, my clients are here in the courtroom today. I will

1 touch on it very briefly just at the end just with a few
2 words. If the Court must ask anything else about it, I will,
3 but I don't want to on the record go into anything
4 confidential or anything like that.

5 THE COURT: Of course not.

6 MR. NORRIS: Circling back to Starmark, however.
7 Starmark's out of the case. I am sure the Court can put two
8 and two together and figure out why Starmark is out of the
9 case. We don't believe that the South Carolina action against
10 the Kinsingers should be a factor in the north.

11 We believe that the Kinsingers should now have the
12 ability to satisfy that bill, which incidentally was greatly
13 reduced by we're not sure. They didn't answer discovery on
14 that. We're not sure if it was reduced by voluntary --

15 THE COURT: But that -- I don't care.

16 MR. NORRIS: Okay.

17 THE COURT: I mean, you're telling me all this
18 stuff.

19 MR. NORRIS: That's fine.

20 THE COURT: I don't care. I want to know the legal
21 arguments.

22 MR. NORRIS: That's fine. The legal.

23 THE COURT: What goes forward and what gets thrown
24 out.

25 MR. NORRIS: I understood.

1 The legal arguments are that there's been an
2 inflation by plaintiffs of Starmark and SmartCore in this
3 case. Starmark had fiduciary responsibilities. Starmark was
4 the one who made the medical necessity denial, even though
5 they first approved it. They then backed up and denied it,
6 and they told Mr. Kinsinger that. Mr. Kinsinger is held to
7 that standard of actual knowledge. They went ahead with the
8 procedure anyway.

9 There's a difference between pre-cert and post-cert.
10 And what Starmark did was to provide the pre-cert initial
11 approval and then followed it up with a denial. The
12 Kinsingers were aware of that. That's the reason why we have
13 our affidavits in the record.

14 THE COURT: Well, how -- how -- how do we jump to
15 Mr. Good and Mr. Winn becoming, you know, the administrators
16 of the plan? I mean, and -- so if they jumped to become the
17 administrators of the plan, and your own argument is Starmark
18 is the fiduciary and they've taken that position. So they're
19 now the fiduciary. You can't really have it both ways. You
20 can't say --

21 MR. NORRIS: I don't --

22 THE COURT: -- Starmark is a fiduciary. And then
23 when you get rid of Starmark, my clients really aren't
24 responsible.

25 MR. NORRIS: But we didn't get rid of Starmark.

1 SmartCore didn't get rid of Starmark. That's the issue.
2 Starmark got rid of itself. And one of their last acts
3 on the way out the door was to deny the Kinsingers' claim.
4 And the Kinsingers were aware of our whole argument on failure
5 to exhaust remedies comes from -- failure to exhaust
6 administrative remedies come from because they didn't do
7 anything. They sat on their rights for an inexplicable amount
8 of time. And our contention, as the Court is aware, I know
9 you've read the briefs, Your Honor, is that bars all of their
10 ERISA claims except for the plan documents claim. And breach
11 of fiduciary duty is really just a recast denial of benefits
12 claim.

13 So we've got two problems. The first is that
14 SmartCore, they were not the fiduciaries that were responsible
15 for making medical necessity decisions at the time when a
16 denial was made of this procedure; Starmark was. Starmark
17 made it. Starmark's now out of the case. So SmartCore
18 defendants ought to get credit or an offset from the fact that
19 Starmark is out of the case.

20 THE COURT: How legally? How does that happen
21 legally?

22 MR. NORRIS: Well, I think it happens legally
23 because if they were still in the case, then as we've
24 attempted to put the case over --

25 THE COURT: But you said you then tolled the

1 agreement to keep them out of the case. Now you're saying
2 they should be in the case.

3 MR. NORRIS: To simply --

4 THE COURT: Your arguments are kind of circuitous.

5 MR. NORRIS: Well, Your Honor, maybe so.

6 THE COURT: Yeah.

7 MR. NORRIS: Here's the thing, is that we wanted to
8 get the Kinsingers paid, frankly. We wanted to make sure that
9 their unpaid bill was taken care. We didn't think this needed
10 to be a whole thing. Mr. Tyson is talking about \$410,000 in
11 failure to provide documents. Didn't think it needed to be
12 that.

13 The wage claim, yeah, they don't really contest
14 that. However, I think they're happy to take a judgment.
15 Frankly, if the wage claim was the only thing that had been
16 brought, I don't think we'd be here today. But the whole
17 problem is --

18 THE COURT: Well, are you saying, and you're
19 agreeing, that there's damages of \$6,250 plus 8 percent
20 interest under North Carolina law?

21 MR. NORRIS: I would only ask that I have permission
22 to check with Mr. Winn and Mr. Good before I admit that
23 judicially, Your Honor. I believe that's our contention. I
24 would like to check with them and have that opportunity.

25 THE COURT: All right.

1 MR. NORRIS: But, in any event, the whole thing goes
2 back to Starmark as far as the medical necessity. And I
3 understand it's circuitous, but Starmark is the one who left
4 SmartCore hanging. So, yes, we agreed to a tolling agreement
5 because we didn't think we were going to be in a position
6 where the counterclaim and the cross-claims between Starmark
7 and the SmartCore parties that I represent were going to have
8 to be litigated. We thought that we were going cooperatively
9 to York to settle this matter, take care of the Kinsingers,
10 get it taken care of. That didn't happen.

11 Starmark is out of the case. My clients have the
12 remedy against Starmark. But it's important to understand
13 that Starmark is the one that was a fiduciary, made the
14 medical necessity decision, denied the claim.

15 It's also important to realize, Your Honor --

16 THE COURT: Did they get the money?

17 MR. NORRIS: Did who get the money?

18 THE COURT: Well, initially did they get the money
19 from SmartCore for the claim?

20 MR. NORRIS: To fund the -- yes. To fund the claim,
21 yes.

22 THE COURT: So SmartCore paid -- SmartCore paid --

23 MR. NORRIS: Well --

24 THE COURT: -- to Starmark?

25 MR. NORRIS: -- one of the --

1 THE COURT: Yes or no. No.

2 MR. NORRIS: No.

3 THE COURT: Okay. Well, see, that's the problem.

4 You keep saying --

5 MR. NORRIS: Oh, no. I'm sorry.

6 THE COURT: -- the bad guy is not in the room --

7 MR. NORRIS: No. I misunderstood.

8 THE COURT: -- is what you're saying, and then
9 you're coming back in and saying but we never paid the money.
10 Once again, that is a circuitous argument.

11 MR. NORRIS: I misunderstood the Court's question.

12 THE COURT: They did pay?

13 MR. NORRIS: SmartCore did hire Starmark, yes.

14 Absolutely.

15 THE COURT: Did they actually pay, though?

16 MR. NORRIS: Yes.

17 THE COURT: And that money stopped at Starmark? It
18 went to them and stopped there?

19 MR. NORRIS: Yes. And Starmark had a dual role.
20 They were -- first of all, they were the third-party
21 administrator, plan fiduciary under ERISA, and they were also
22 under the Trustmark entity, which Your Honor probably saw from
23 the pleadings, they were the stop-loss insurance provider. We
24 talked about that. I wouldn't exactly call them reinsurance.
25 I'd call them excess insurance, catastrophic. Same thing Your

1 Honor said here.

2 THE COURT: Yeah.

3 MR. NORRIS: So, in any event, they had that dual
4 role. And then there was a payment dispute between Starmark
5 and SmartCore, part of which revolved around the fact that in
6 terms of the Starmark and SmartCore agreement were murky.
7 Mr. Winn and Mr. Good will testify, if necessary, that they
8 didn't understand that it was a self-funded plan. And there's
9 actually a broker, another third party, who we didn't think it
10 was necessary to bring before the Court in this case. But
11 there's all sorts of malfeasance, Your Honor, on the part of
12 Starmark, on the part of this broker that brought this
13 arrangement to SmartCore --

14 THE COURT: It just -- it just baffles me, though,
15 why you have a tolling agreement with Starmark when you're
16 sitting here attacking them, and that's totally inconsistent.

17 MR. NORRIS: Well, I mean, I suppose we could bring
18 them back in the case --

19 THE COURT: Well, that's it.

20 MR. NORRIS: -- if the Court prefers.

21 THE COURT: But you -- you're keeping them out of
22 the case and then blaming them, which is actually I've seen
23 this many times. When you have a weak case, you blame a third
24 party.

25 MR. NORRIS: Well, we -- they wouldn't have been a

1 third party, Your Honor. Again, it was a strategy that, you
2 know, my clients asked me to agree with. Frankly, we were
3 surprised that Starmark agreed with it because Starmark
4 claimed there was various unpaid, you know, whatever, unpaid
5 claims, something that who knows, something that SmartCore
6 owed to Starmark. They agreed to it. We tried to get them
7 out of the case to simplify the case to deal with the
8 plaintiffs, and that brings me to my final set of comments.

9 Oh. On the plan documents, Your Honor, I, frankly,
10 do not understand plaintiffs' argument. As we've covered in
11 our brief, both our summary judgment motion and response,
12 their opposition to their summary judgment motion, we did
13 provide the documents and cited the case that says, you know,
14 you don't have to keep providing the same documents over and
15 over again.

16 The one point they did raise I think in their reply
17 was that we didn't provide a copy of the administrative
18 services agreement between Starmark and SmartCore. First of
19 all, they already had it. That's how they knew about it.
20 Second of all, by that time it didn't exist. It no longer
21 existed because Starmark got canceled. So that's the plan
22 documents.

23 THE COURT: All right.

24 MR. NORRIS: Your Honor, Starmark definitely is a
25 wrongdoer here. What we do not understand is why Starmark was

1 let out of the case so easily by plaintiffs, because
2 everything that you've heard today that goes against SmartCore
3 has been raised against SmartCore by the plaintiffs can also
4 be raised against Starmark, and yet Starmark was let out of
5 the case. My clients remain -- or there seems to be a little
6 bit of a tinge of punitive conduct there. I think Mr. Tyson
7 even used that term to describe the plan documents claim.

8 So --

9 THE COURT: But you're -- do you disagree that you
10 can't get punitive damages?

11 MR. NORRIS: For the plan documents?

12 THE COURT: Yes.

13 MR. NORRIS: I don't think there's punitive damages
14 statutorily.

15 THE COURT: Yes.

16 MR. NORRIS: No. Certainly not going to argue the
17 language of ERISA, no. But, but if Your Honor looks at the
18 Fourth Circuit case law -- I'm sure you've handled plenty of
19 ERISA cases in your time, Your Honor.

20 THE COURT: Not -- not as many as -- I mean, I've
21 had a lot of ERISA cases, but they're spread out usually like
22 two a year.

23 MR. NORRIS: Okay.

24 THE COURT: Not -- not like in employment cases
25 where kind of two a month.

1 MR. NORRIS: Sure. Yeah, I can imagine, ADA and
2 that sort of thing.

3 Your Honor, the plan documents. Any research into
4 Fourth Circuit precedent or, frankly, the precedent of any
5 other circuit, Ninth Circuit which I come from, do most of my
6 litigation, not all. The plan document claims when you get
7 into those penalties and things that Mr. Tyson is talking
8 about, the multiple hundreds of thousands of dollars, you're
9 talking about egregious failures to provide documents that
10 directly prejudice plaintiffs' case. They actually have the
11 burden to prove that, and there's no burden here. They can't
12 at the same time argue, well, the administrative record is the
13 exclusivity of what the Court needs to look at, and then at
14 the same time say but we were also prejudiced by failure to
15 provide plan documents.

16 There's no failure to provide plan documents in the
17 first place. Even if there was, there was no prejudice. So
18 we don't believe that really any award on that is proper.

19 And then the last thing I'll say, Your Honor, is I
20 can certainly check with my clients on the wage claim.

21 And I did want to say a word about settlement. If
22 the Court is inclined to provide an opportunity for the
23 opportunities to talk, I -- I don't -- I hesitate to get into
24 this, but we thought we had this resolved it twice already,
25 twice, for the same arrangements let's put it that way, and

1 yet that is not the case. So we're actually a little puzzled
2 why we're here today. But, in any event, I'll just say that.

3 THE COURT: It can't be done this week and that's a
4 shame because you're here, because I have hearings this
5 afternoon also.

6 MR. NORRIS: Sure.

7 THE COURT: Unless -- unless I get one of my
8 colleagues. Virtually all of my colleagues want to have a
9 little bit of time to read up on the case. So I just can't
10 call -- pick up the phone and call them and say, "Can you
11 suddenly do a judicial settlement conference?"

12 MR. NORRIS: Yeah.

13 THE COURT: But, I mean, we could -- we could try to
14 fit one in in a few weeks.

15 MR. NORRIS: Yeah. I mean, I'd be happy to come
16 back in March, Your Honor, for that. You mentioned early
17 April. We'd be happy to try that.

18 THE COURT: My schedule in March is entirely based
19 on what happens in a Bloods case, United Blood Nation trial,
20 which takes precedent on the Speedy Trial Act over civil
21 cases.

22 MR. NORRIS: Of course.

23 THE COURT: If you could check with your client.
24 Let me turn to Mr. Lime for one quick second. Can you give me
25 the gist -- yeah, did I say that right?

1 MR. GLENN: Mr. Glenn.

2 THE COURT: Oh, I'm so sorry. Mr. Glenn.

3 Can you quickly give me the gist of the motion to
4 set aside default?

5 MR. GLENN: Yes, Your Honor. So just to be clear,
6 it's an entry of default only and not a default judgment.

7 THE COURT: Right. I know that.

8 MR. GLENN: Yes, sir.

9 The gist of it is this: Jared Crook was an employee
10 only of SmartCore, just like the plaintiff, SmartCore, LLC.
11 He didn't have any other involvement with either benefits,
12 whether it was procuring benefits or determining who obtained
13 benefits. He didn't have any fiduciary or other relationship
14 to those things. He's an electrical contractor. And he gets
15 swept up in this case out of an abundance of caution on the
16 plaintiffs' side and I didn't -- naming all of the SmartCore
17 entities that were out there and all the folks that showed up
18 in any of their paperwork.

19 His -- his -- he shows up in the SmartCore Electric,
20 LLC's paperwork as a manager because he was the qualifying
21 person for general -- for electrical contracting purposes for
22 that entity.

23 THE COURT: Um-hum.

24 MR. GLENN: But he didn't have any other role
25 regarding any of these other entities.

1 He was -- he was served with the documentation, with
2 the complaint initially in January. He immediately called his
3 former employer to ask what was going on, and they said, You
4 don't have any involvement in this. We'll take care of it.
5 You don't have to do anything further.

6 So he didn't really even know he had not been
7 responded on behalf of until he received the motion for entry
8 of default which was served the end of December, which he
9 didn't receive it until after he returned from vacation in
10 early January. He didn't even realize that they hadn't
11 responded on his behalf.

12 THE COURT: All right.

13 MR. GLENN: So he doesn't have any substantive
14 involvement in any of this. We don't take any position with
15 regard to any of the disputes with regard to the fiduciary
16 obligations or anything like that.

17 I think it's important for the Court to note that
18 before the motion for entry of default was filed, sworn
19 discovery responses from the defendants in this case indicate
20 that Mr. Crook has no involvement in any of this. It's not a
21 matter simply of him denying the claims. It is a matter of
22 existing sworn testimony where they acknowledged they were the
23 folks who were involved in officinary decisions. That they, in
24 fact, specifically said he had no involvement with any of
25 those decisions.

1 THE COURT: Okay. Thank you. I got the gist of it.
2 I appreciate it.

3 MR. GLENN: Yes.

4 THE COURT: And the status of the --

5 MR. NORRIS: Sure. If I could just follow-up. We
6 have no problem with Mr. Crook's positions here. We are not
7 the ones been holding any in the case. We have no issue with
8 anything Mr. Glenn just said.

9 Yeah, Mr. Winn and Mr. Good are willing to take a
10 judgment against them for the 6,250 I believe it is, and we'll
11 even agree to the double damages award, and perhaps that could
12 prime the pump for the judicial settlement conference that
13 Your Honor proposed. I don't know if --

14 THE COURT: Well, let me --

15 MR. NORRIS: -- you delegate that to a magistrate.

16 THE COURT: Well, I can't give it to him this
17 afternoon.

18 MR. NORRIS: No. Later, later on, March or April.

19 THE COURT: Let's take a 10-minute recess, and I'll
20 come back and give you some answers. Then we can talk about
21 the future after that --

22 MR. NORRIS: Thank you, Your Honor.

23 THE COURT: -- regarding this morning's hearing.

24 (The proceedings were recessed at 11:46 a.m. and
25 reconvened at 12:00 p.m.)

1 THE COURT: Thank you for your patience. Sorry it
2 took longer than I anticipated.

3 After reviewing the briefs, the record in this case,
4 and hearing arguments from counsel, the Court is prepared to
5 issue an oral ruling on the pending motions.

6 The Court hereby grants plaintiffs' motion for
7 summary judgment and denies defendants' motion for summary
8 judgment with regards to liability for plaintiffs' breach of
9 contract and North Carolina wage and hour claims.

10 The Court finds that there's no genuine dispute of
11 material fact that plaintiff worked between January 16 through
12 February 19, 2016, and was not paid for his work.

13 Plaintiff is entitled to \$6,250 plus double damages
14 and applicable interest at the North Carolina state rate.

15 Furthermore, the Court finds that as a matter of law
16 Defendants Good and Winn can be individually liable to
17 plaintiff under the North Carolina Wage and Hour Act.
18 Therefore, the Court finds that the defendants are jointly
19 and severally liable to plaintiff -- plaintiffs for unpaid
20 wages -- well, wages just the plaintiff -- plus appropriate
21 interest between January 16 and February 19, 2016.

22 Now, the Court will schedule a hearing at a later
23 date and order briefing to determine interest and attorneys'
24 fees.

25 Now, with regards to plaintiffs' ERISA claims, the

1 Court hereby denies both parties' motions for summary judgment
2 and will hold a bench trial. At the bench trial, the Court
3 will hear from all individuals who have submitted affidavits
4 in this case. And, of course, wants to emphasize the Court
5 wants to hear from everyone that submitted an affidavit in
6 this case. Parties may present additional witnesses for their
7 respective cases. Following the trial, the Court will make
8 credibility determinations as to the witnesses and findings of
9 fact.

10 Now, since the case management order in this case
11 was originally issued for a jury trial, the Court will issue a
12 revised case management order, which will also try to find
13 some time for a judicial settlement conference. So that will
14 be -- that case management order for the bench trial and
15 settlement conference will be issued within the next two
16 weeks.

17 So this case will not be affected by the docket call
18 in early March. We will be squeezing it in after the docket
19 call in March. As I say, I don't have the dates yet because I
20 have to go look at my calendar.

21 And within the next couple weeks, while we're
22 putting together this case management order, we will see if
23 the Bloods case that I talked about earlier goes away.
24 There's a possibility. I think it's an outside possibility,
25 but there's a possibility. So that could move this bench

1 trial forward to an earlier date sometime in March. But right
2 now I'd say it wouldn't be before subject to -- assuming the
3 Bloods goes forward, it wouldn't -- we wouldn't have our bench
4 trial and judicial settlement conference until late March,
5 early April.

6 So that is my oral ruling. There will not be a
7 follow-up order other than the case -- amended case management
8 order.

9 Of course, the issue of the setting aside the entry
10 of default against Mr. Crook is something the Court will have
11 to rule on once it hears from plaintiffs.

12 I ask counsel is there any questions about that
13 ruling?

14 MR. NORRIS: Just administrative questions, Your
15 Honor.

16 THE COURT: Um-hum.

17 MR. NORRIS: So I need to be able to -- I realize
18 this isn't the Court's problem, first of all. I need to
19 schedule my calendar to know whether or not, you know, if I
20 get asked by bench officers out in California, "Are you
21 available?" If we're going to do this trial in March now, I
22 need to know to tell them, "No, I'm being held over for one
23 that could go over in Charlotte." Is that -- I'm confused. I
24 know it depends on this case that you mentioned.

25 THE COURT: Right. We'll try to get the case

1 management order out earlier, but I'm really trying to see
2 what happens with the Bloods trial.

3 MR. NORRIS: Okay.

4 THE COURT: So we'll do the best we can. I
5 understand that counsel has conflicts. I do understand that.

6 MR. NORRIS: Sure.

7 THE COURT: Anything else?

8 MR. TYSON: Yes, Your Honor. With respect to the
9 case management order, will that talk about when the trial is
10 to be set?

11 THE COURT: Because it's a bench trial, I can fit it
12 in around other things. So it will, yes.

13 MR. TYSON: Okay. It will tell us when to do the
14 trial subpoenas and everything else for that?

15 THE COURT: It should have all of that in there.

16 MR. TYSON: Thank you.

17 MR. NORRIS: And one last thing, Your Honor. My
18 understanding is that the Court is considering ordering a
19 judicial settlement conference, which would be part of the
20 case management order.

21 THE COURT: Right. We're going to add that in the
22 case management conference.

23 MR. NORRIS: Thank you. Thank you.

24 THE COURT: I'd like to do that separately, but that
25 would require a lot of travel. But maybe -- if we could do

1 that in the near future, it might solve -- save everyone a lot
2 of money. I have to look at my calendar. We'll get it out in
3 the case management order as soon as we can.

4 MR. NORRIS: Thank you.

5 THE COURT: All right. Thank you very much.

6 (The proceedings concluded at 12:30 p.m.)

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA

CERTIFICATE OF OFFICIAL REPORTER

I, Jillian M. Turner, RMR, CRR, CRC, Federal Official Court Reporter, in and for the United States District Court for the Western District of North Carolina, do hereby certify that pursuant to Section 753, Title 28, United States Code, that the foregoing is a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

Dated this the 3rd day of May 2019.

/s/ Jillian M. Turner
Jillian M. Turner, RMR, CRR, CRC
U.S. Official Court Reporter